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TOWN OF LOOMIS

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PUBLIC EMPLOYMENT &
RETIREMENT

March 8, 2011

Ms. Susan Lee, Supervising Deputy Attorney General
Opinion Unit, Office of the California Attorney General
455 Golden Gate Ave., Suite 11000
San Francisco, CA 94102

Dear Ms. Lee:

I am writing on behalf of the Town of Loomis to request an opinion from the California Attorney General concerning the following questions:

1. Does the requirement in subdivision (b) of Government Code section 36502 that a proposed municipal term limits ordinance "shall apply prospectively only" mean that prior time in office served by a city council member, whether full or partial terms, may not count against any limitation on time in office proposed by a new municipal term limits ordinance?
2. If a municipal term limits ordinance adopted on November 2, 2010 included a provision that a council member who has served two terms prior to August 1, 2010 must sit out eight years before serving on the council again, would council members who were elected on November 2, 2010 be lawfully entitled under existing state law to serve two additional terms before being subject to the waiting period provision?

I am requesting the Attorney General's opinion on these questions involving the application of existing law, including subdivision (b) of Government Code section 36502, to assist in evaluating the need for potential legislation based on recent events brought to my attention by citizens in the Town of Loomis, California. Those events, as well as the legal principles as I understand would apply to them under existing law, are set forth below.

BACKGROUND

The Town of Loomis is a small municipal corporation existing in Placer County California. The Town is operated as a general law city and, therefore, both the Town Council (its governing body) and the Town's voters are subject to the general laws enacted by the Legislature. The Town Council consists of five members, each being elected to a four year term of office. Elections for the Town Council seats are held alternatively every two years. Prior to November 2010, there was no limit on the number of terms a person could serve on the Town Council.

In 2009, a group of local citizens began circulating a petition to place an initiative measure before the Town's voters proposing that term limits be imposed for members of the Town Council. The group submitted signatures in support of the petition from at least ten percent, but less than fifteen percent, of the city's voters. Consistent with Elections Code sections 9215 and 1405, the Town Council ordered that the proposed term limits initiative be submitted to voters on November 2, 2010 – the date of the next regularly scheduled Town election.¹

The proposed term limits initiative was given the title "Measure A." As it appeared on the November 2, 2010 ballot, Measure A stated as follows:

Shall the proposed ordinance entitled "An Initiative of the Loomis Town Citizens Enacting Term Limits" which provides: (1) five council members serve 4-year terms; (2) terms shall be staggered; (3) no member can serve more than two consecutive 4-year terms; (4) a member who has served two terms prior to August 1, 2010 must sit out eight years; and (5) current members can complete their terms, be adopted?

On November 2, 2010, the Town's voters adopted Measure A. At that election, the Town's voters also re-elected two members of the Town Council – Walt Scherer and Miguel Ucovich – and elected one new member, Sandra Calvert, who had not previously served on the Town Council. The Placer County Registrar of Voters submitted the final vote tallies for Measure A and for candidates seeking election as members of the Town

¹ Elections Code section 9215 provides in relevant part:

If the initiative petition is signed by not less than 10 percent of the voters of the city . . . the legislative body shall do one of the following:

*

(b) Submit the ordinance, without alteration, to the voters pursuant to subdivision (b) of Section 1405 [].

Subdivision (b) of Elections Code section 1405 provides in relevant part:

The election for a municipal or district initiative that qualifies pursuant to Section 9215 or 9311 shall be held *at the jurisdiction's next regular election* occurring not less than 88 days after the date of the order of election. (Italics added.)

Council in December 2010. The Town Council voted to accept the vote at its December 14, 2010 meeting. Since members' terms of office formally end on the second Tuesday in December of alternate years – a date which coincides with the Town Council's regular December meeting – newly elected and re-elected members are typically sworn in at the December meeting. Thus, Mr. Scherer and Mr. Ucovich, as well as newly elected member Sandra Calvert, were sworn into office at the December 14th meeting.

APPLICABLE LAW AND ANALYSIS

I. Government Code Section 36502(b)

Subdivision (b) of Government Code section 36502 provides in relevant part:

Notwithstanding any other provision of law, the city council of a general law or charter city may adopt or the residents of the city may propose, by initiative, a proposal to limit or repeal a limit on the number of terms a member of the city council may serve on the city council []. Any proposal to limit the number of terms a member of the city council may serve on the city council, or the number of terms an elected mayor may serve, *shall apply prospectively only* and shall not become operative unless it is submitted to the electors of the city at a regularly scheduled election and a majority of the votes cast on the question favor the adoption of the proposal. [].

The guide star of statutory construction is to ascertain the Legislature's intent so as to effectuate the purpose of the law. (*Alexander v. Superior Ct.* (1993) 5 Cal.4th 1218, 1226.) Absent some ambiguity, courts will presume that the Legislature intended for a statute to be applied in accordance with the plain meaning of the words used. The italicized phrase in subdivision (b) appears unambiguous – the limitations imposed by municipal term limits ordinances shall apply “prospectively.” The word “prospective” is ordinarily understood to refer to future – not past – events or conduct. Under the plain meaning rule then, subdivision (b) would appear to preclude the counting of any past service on the Town Council, whether whole or partial terms, for purposes of the limitations sought to be imposed by Measure A.

If a court found the phrase “shall apply prospectively only” to be ambiguous, it would examine documents that chronicle the legislative history underlying the addition of subdivision (b) to section 36502. Courts routinely consult the legislative history materials, including legislative bill analyses and reports, to interpret ambiguous words or phrases contained in statute. (*Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 180.) Here, the legislative history of subdivision (b) seems to support an interpretation that precludes the counting of past service for purposes of applying Measure A.

Subdivision (b) was added to section 36502 in 1995 by the enactment of Senate Bill 2 (Stats. 1995, ch. 432) (“SB 2”). The legislative committee analyses for SB 2 state that the Legislature added subdivision (b) to resolve the question of whether cities, both chartered and general law, possessed the authority to enact terms limits for their

governing councils.² Prior law neither expressly authorized nor prohibited the imposition of municipal term limits and several courts of appeal had issued conflicting decisions on whether cities possessed the authority to impose term limits. SB 2 sought to resolve this conflict by expressly authorizing that municipal term limits may be imposed by a city's governing body or by initiative.

The legislative history of SB 2 indicates that the author's inclusion of a provision stating that municipal term limits would only apply prospectively may have been a factor in obtaining its enactment. The committee analyses state that the author of SB 2, then-State Senator Quinten Kopp, introduced similar bills to authorize the imposition of municipal terms limits during both the 1993-1994 and 1992-1993 legislative sessions.³ Neither bill specified that municipal term limits would only apply prospectively; both bills failed to gain approval in the State Assembly. The version of SB 2 introduced by then-State Senator Kopp in 1995 likewise did not specify that municipal term limits would only apply prospectively. As introduced, SB 2 failed passage in the Senate Elections and Reapportionment Committee. However, the bill later obtained passage in committee – and eventually both the Senate and Assembly – after being amended to provide that municipal term limits “shall apply prospectively only.”

The legislative committee analyses describe the effect of this amendment as requiring that “term limit proposals would have to be prospective in their application.” The Secretary of State's Office also prepared a bill analysis of the amended version of SB 2.⁴ That analysis states:

The bill requires that limits apply prospectively; *time in office already served by an officeholder would not count against any limit on time in office imposed as a result of this bill.* (Original emphasis.)

The legislative history underlying the enactment of subdivision (b) of Government Code section 36502 thus appear to support an interpretation of existing law that precludes the counting of prior time in office for purposes of term limits imposed by a city's governing body or by initiative. This interpretation would be consistent with the general rule that “legislative enactments are presumed to operate prospectively and not retroactively unless a different intention is clearly expressed or implied from the legislative history or the context of the enactment.” (*City of Monte Sereno v. Padgett* (2007) 149 Cal. App.4th 1530, 1538; see also *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 291; *Kizer v. Hanna* (1989) 48 Cal.3d 1, 7.)

II. Elections Code Provisions Specifying the Effective Date of Local Initiative Ordinances and the Process for Certifying Newly Elected Council Members

² Senate Committee on Elections & Reapportionment Analysis, Sen. Bill No. 2 (as amended April 17, 1995). Additional legislative committee analyses for SB 2 are available from the Legislative Counsel's website at www.leginfo.ca.gov.

³ See, e.g., Senate Rules Committee Analysis, Sen. Bill No. 2 (as amended June 21, 1995) at page 2 [referring to Senate Bill 2 (1993-94) and Senate Bill 1298 (1992-93)].

⁴ Office of the Secretary of State, Elections Division, Analysis, Sen. Bill No. 2 (as amended April 17, 1995) at 2.) A copy of the Secretary of State's Analysis of SB 2 is attached to this request.

Assuming the requirement in subdivision (b) of Government Code section 36502 that municipal term limits “shall apply prospectively only” means that newly adopted limits may only apply to future service, not past service, the question becomes at what point in the future do the new limits become applicable?

As a general matter, the “effective date” of an ordinance determines when the provisions in the ordinance begin to have the force and effect of law. The effective date of initiative ordinances adopted by city voters is specified in Elections Code section 9217, which provides:

If a majority of the voters voting on a proposed ordinance vote in its favor, the ordinance shall become a valid and binding ordinance of the city. The ordinance shall be considered as adopted upon the date that the vote is declared by the legislative body, *and shall go into effect 10 days after that date.*⁵ (Emphasis added.)

Elections Code section 10263 directs that, upon completion of the canvass “and before installing the new officers, the governing body [of a city] shall adopt a resolution declaring” the vote as provided in section 10264. Thereafter, “[t]he governing body shall declare elected the persons for whom the highest number of votes were cast for each office.” Except for consolidated elections, the governing body shall meet to declare the results of an election and to install new officers no later than the fourth Friday after the election. For consolidated elections, the governing body shall meet to declare the results of an election and to install new officers no later than its next regularly scheduled meeting following presentation of the final canvass.

Elections Code section 10265 imposes certain duties on the elections official after the governing body has declared the results of an election. Specifically, section 10265 states:

The elections official shall immediately sign and deliver to each person elected a certificate of election. He or she shall also administer to each person elected the oath of office prescribed in the California Constitution.

Previously, the California Attorney General concluded that the taking of the oath of office constitutes the moment at which a person’s term in the State Senate begins for purposes of term limits. (See 86 Ops. Cal. Atty. Gen. 43.) One rationale cited by the Attorney General for this conclusion was that a person elected to the State Senate is not entitled to begin exercising his or her legislative duties until the results of the election were certified and the oath of office is taken. (*Id.* at 45.) The Attorney General also recognized that because the right to hold public office is a fundamental right of citizenship, any ambiguities concerning the right to hold office “are to be resolved in favor of the right to hold office.” (*Id.* at 47.) Among the authorities cited in the Attorney General’s opinion was *Woo v. Superior Court* (2000) 83 Cal.App.4th 967, a case in which the court of appeal construed the phrase “more than two terms” in a

⁵ Ordinances adopted by a city council generally take effect 31 days after adoption. (Gov. Code, § 36937.)

municipal term limits law to refer to “the time that [a council member] began to serve.” (*Id.* at 976, fn. 8.) In other words, that time occurring *after* the council member was entitled to exercise the rights and privileges of the office.

The significance previously ascribed to the taking of the oath of office by the Attorney General, the court of appeal’s emphasis on the time when a city council member begins to “serve” for purposes of interpreting a municipal term limits law, and the existing provisions in the Elections Code for declaring the results of municipal elections would appear to operate in conjunction to produce the following result based on the facts stated at the outset of this request.

First, when the Town Council discharged its duty to declare the results of the November 2, 2010 election at its regularly scheduled December 14, 2010, it created an obligation on the part of the elections official, pursuant to Elections Code section 10265, to immediately issue a certificate of election and administer the oath of office to persons who had received the highest number of votes for the office of member of the Town Council. The elections official for Loomis discharged these duties on December 14, 2010. The taking of the oath of office marked the beginning of the term of office to which persons were elected as members of the Town Council on November 2, 2010.

Second, because Elections Code section 9217 provides that a municipal initiative ordinance adopted by the voters does not become effective until 10 days after the city’s governing body declares the results of the election, existing state law precluded the provisions in Measure A from having any legal force or effect prior to December 24, 2010. Thus, when on December 14, 2010, the re-elected and newly elected members of the Town Council began the terms of office to which they were elected on November 2, 2010, there was no term limits ordinance in effect for the office of member of the Town Council.

Third, because subdivision (b) of Government Code section 36502 expressly provides that a municipal term limits ordinance “shall apply prospectively only” – i.e., to future conduct occurring after such an ordinance were in force – service on the Town Council which began prior to December 24, 2010 could not be counted towards any limitations imposed by Measure A. Under existing law, then, it would appear that the three persons who were elected (or re-elected) to the office of member of the Town Council on November 2, 2010 are entitled to serve the entirety of their present terms of office before being subject to any limitations on office imposed by Measure A. The limitations on office imposed by Measure A would not apply to the members of the Town Council who were elected on November 2, 2010 or who were currently serving on the Town Council on that date. Measure A’s limitations will begin applying to those persons in the event they are re-elected to the Town Council at a future date. If so, they would be entitled to serve two additional terms of office before being subject to the eight-year waiting period proposed in Measure A.

Your assistance in this matter is appreciated. If you wish to discuss this request further, or if you require additional information, please don't hesitate to contact me or Mrs. Terry Wardley in my Roseville office at (916) 783-8232, or terry.wardley@sen.ca.gov.

Best regards,

(signed original)

TED GAINES
Senator, First District